Supreme Court, U.S.
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No. 05-390

In The
Supreme Court of the United States

THERON M. McCLAIN,

Petitioner,

v.

RETAIL FOOD EMPLOYERS JOINT PENSION PLAN AND BOARD OF TRUSTEES OF RETAIL FOOD EMPLOYERS JOINT PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT F. HUNT
Counsel of Record For Petitioner

HUNT, HASSLER & LORENZ LLP
100 Cherry Street
P.O. Box 1527
Terre Haute, Indiana 47808
(812) 232-9691, Fax (812) 234-2881

EDGAR PAUK, ESQ.
144 East 44th St, Suite 600
New York, New York 10017
(212) 983-4000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does ERISA require that for purposes of calculating the pension amount, all years of pre-ERISA participation in the plan must be credited, regardless of breaks in service, unless a break is equal to or longer than the period of participation before the break?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS, THEREBY PRODUCING INCONSISTENT RESULTS FOR PARTICIPANTS IN NATIONAL PLANS AND CREATING CONFLICTING DUTIES FOR PLAN ADMINISTRATORS. FURTHERMORE, THE DECISION BELOW IS INCONSISTENT WITH THE INTERNAL REVENUE SERVICE REGULATIONS	5
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, 420 F.3d 220 (3rd Cir. 2005) 3

Hoover v. Bank of America Corp., 2003 WL 22300499 (MD Fla., Sept. 24, 2003), *aff'd*, 127 Fed. Appx. 470, 2005 WL 80957 (11th Cir., Jan. 5, 2005) 3

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 5

Jones v. UOP, 16 F.3d 141 (7th Cir. 1994) 3

McDonald v. NYSA-ILA Pension Plan, 320 F.3d 151 (2d Cir. 2003) 3

STATUTES:

28 U.S.C. §1254(1) 1

29 U.S.C. §1001, *et seq.* 1

29 U.S.C. §1001(a) 5

29 U.S.C. §1132 5

29 U.S.C. §1132(e)(2) 6

29 U.S.C. §1052(b) 4

29 U.S.C. §1052(b)(4)(A) 7

29 U.S.C. §1054(b)(3)(A) (1976) 4

29 U.S.C. §1054(b)(4)(A) (1976) 7

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The District Court's opinion (per Barker, D.J.) granting respondents' motion to dismiss the Amended Complaint (which was treated by the Court as a motion for summary judgment) is unpublished (S.D. Ind. Aug. 9th, 2004). (Appendix App. 10).

The Court of Appeals' opinion (Manion, J., joined by Rovner and Sikes, JJ) affirming (App. 1) is published at 413 F.3d 582 (CA7 2005).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on June 27, 2005. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are sections of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.*, *as in effect in 1976* (although those provisions were amended since that time, they

remain substantially the same). The 1976 provisions involved are reprinted in the Appendix at App. 24.

STATEMENT OF THE CASE

Petitioner, is a retired participant in Defendant, Retail Food Employers Joint Pension Plan, a multi-employer defined benefit pension plan from which he receives a pension. Although he worked in covered employment under the Plan for a total of 27 years, his pension is based only on his last 11 years of service. The Plan disregarded his prior 16 years of service due to a pre-ERISA break in service.

It is undisputed that ERISA permits a plan to enforce its pre-ERISA break in service provisions for vesting purposes, but that there is no similar provision governing accrual. On the contrary, ERISA provides that, for accrual purposes, all years of service during plan participation must be taken into account, unless the break in service, whether pre- or post-ERISA, is as long or longer than the period of service before the break. This ERISA provision is referred to as the "rule of parity."

In short, it is undisputed that a participant who suffers a pre-ERISA break in service under the terms of a pre-ERISA plan, loses all credited service for *vesting* purposes. The issue presented by this Petition is whether those years must be credited for *accrual* purposes (a) if the participant accumulates enough post-break years of service to vest under ERISA; and (b) if the number of his pre-break years of service is greater than his break years. In other words, the issue is whether ERISA's "rule of

parity" applies for accrual purposes to pre-ERISA service where a participant vests post-ERISA.

In the case at bar the Seventh Circuit, following its earlier decision in *Jones v. UOP*, 16 F.3d 141 (7th Cir. 1994), decided that issue against the participant, Petitioner herein. Yet, the identical issue was decided in favor of the participant in the Second and Third Circuits in *McDonald v. NYSA-ILA Pension Plan*, 320 F.3d 151 (2d Cir. 2003), and *DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220 (3rd Cir. 2005), and by a district court in the Eleventh Circuit in *Hoover v. Bank of America Corp.*, 2003 WL 22300499 (MD Fla., Sept. 24, 2003), *aff'd*, 127 Fed. Appx. 470, 2005 WL 80957 (11th Cir., Jan. 5, 2005) (text).

Pre-ERISA plans provided for a loss of all credited service, regardless of its length, after a break in service as short as one year or less. Thus, countless workers in the construction and other cyclical industries are vitally affected, as well as countless women whose early service was broken for child-birth or child-rearing, but who returned to covered employment post-ERISA. As a consequence, although the issue presented involves a pre-ERISA break in service, it is not a historical curiosity, but continues to recur at present, as shown in the above cases, and will continue to recur for the foreseeable future.

Plaintiff is a resident of West Terre Haute, Indiana. He was employed at National Tea Company from March 1957 to March 1973, and by Grace Foods from April 1, 1984 to April 1993. During those two periods of service both companies contributed to the Plan on his behalf. (From March 1973 to April 1984, Plaintiff was employed

outside the retail food industry and, therefore, was not an active participant in the Plan.)

At the time Plaintiff terminated his employment with Grace Foods in April 1993, he began receiving pension benefits from the Plan, but only in an amount based on his employment with Grace Foods. He has not, and does not receive benefits based on contributions made on his behalf during his pre-break in service employment.

ERISA Section 204(b)(3)(A), 29 U.S.C. §1054(b)(3)(A) (1976), states, in pertinent part, that in determining an employee's accrued benefit, all his years of participation are to be taken into account, beginning at the earliest date on which the employee was a participant in the plan, except for a period of service excluded by ERISA Section 202(b), 29 U.S.C. §1052(b). ERISA Section 202(b) excludes only years of participation lost due to a permanent break in service, that is, a break in service whose length is greater than the number of years of participation accrued before the break (the "rule of parity").

Plaintiff's break in service lasted from March 1973 to April 1984, which is a period that is shorter than his years of participation (March 1957 to March 1973) before the break in service.

The basis of jurisdiction in the District Court is ERISA §502, 29 U.S.C. §1132.[1]

REASONS FOR GRANTING THE WRIT

CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS, THEREBY PRODUCING INCONSISTENT RESULTS FOR PARTICIPANTS IN NATIONAL PLANS AND CREATING CONFLICTING DUTIES FOR PLAN ADMINISTRATORS. FURTHERMORE, THE DECISION BELOW IS INCONSISTENT WITH THE INTERNAL REVENUE SERVICE REGULATIONS

Congress enacted ERISA because employee benefit plans were becoming increasingly interstate and there was a need for a uniform body of law. ERISA §2(a), 29 U.S.C. §1001(a). To promote uniformity, ERISA contains one of the most comprehensive preemption provisions in federal law. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) ("Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law.").

The split among the circuits in interpreting ERISA with regard to the issue of creditable service for accrual

[1] Petitioner has brought this action on his own behalf, and on behalf of a Class of similarly situated participants, beneficiaries and their Estates, pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The District Court deferred consideration of the issue of class certification by agreement of the parties, pending resolution of the motion to dismiss. This motion was converted by the Court to a motion for summary judgment.

purposes undercuts this purpose. As the law now stands, Petitioner, who happened to live in the Seventh Circuit cannot receive pension benefits for 16 years of pre-ERISA service, while he would be credited with those years if he were lucky enough to live in the Second, Third, or Eleventh Circuits. Thus, participants in the same, or same type of, plan with the same fact pattern would have been entitled to drastically different pensions but only because of where they reside.

This disparity is not just an issue of confusion and inequity for plan participants. It creates great uncertainty for the employee benefit plans themselves. ERISA has a very liberal venue provision. ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), permits a plan to be sued "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." As a consequence, when calculating pension benefits, a plan must not only consider the plan's benefit formula, but also consider the impact of all possible venues. Indeed, any participant similarly situated to Petitioner will make sure to bring his action in the Second, Third, or Eleventh Circuits, shunning the Seventh.

In sum, because of the split among the circuits, the benefits to be paid to some participants will be determined by one method, and the benefits to be paid to others in the same type of plan will be determined by another method. A participant's pension rights should be dependent on the governing documents and on a consistent interpretation of ERISA, not on the mere happenstance of venue. It is this Court's task to insure the uniform interpretation of ERISA generally, and particularly ERISA's provisions affecting benefits.

Finally, the Internal Revenue Service, the federal agency entrusted with interpretative and regulatory responsibility regarding ERISA's minimum standards, including the statutory provisions at issue here, supports the Second Circuit's holding. *See* Letter from Mary Joe White, United States Attorney, U.S. Department of Justice, dated February 14, 2001, to Hon. Naomi Reice Buchwald. As stated in the letter, "[t]his letter conveys the views of the Office of Chief Counsel of the Internal Revenue Service (the "IRS"), which is vested with interpretive authority over the regulations relevant to the issue framed by the Court." (App. 49).

> "It is the IRS' position that all years of service should be taken into account to determine an employee's accrued benefit, including years of service both before and after ERISA's effective date of September 2, 1974, except for years of service specifically mentioned in Section 410(a)(5) and Section 411(b)(4)(A) of the Internal Revenue Code (the "IRC"). 26 U.S.C. §§410(a)(5), 411(b)(4)(A)."

The sections cited by the IRS are the IRC analogues to ERISA Sections 202(b)(4) and 204(b)(3)(A) (1976), now numbered 202(b)(4)(A) and 204(b)(4)(A), respectively, 29 U.S.C. §§1052(b)(4)(A) and 1054(b)(4)(A). The IRS' views, as expressed in its letter, are based upon its own Regulations governing the statutory provisions at issue, as more fully set forth in the letter itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT F. HUNT
HUNT, HASSLER & LORENZ LLP
100 Cherry Street
P.O. Box 1527
Terre Haute, Indiana 47807
(812) 232-9691

EDGAR PAUK
144 East 44th Street
6th Floor
New York, New York 10017
(212) 983-4000

Attorneys for Petitioner